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Supreme Court, U.S.
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In The

Supreme Court of the United States

KELVIN ELLIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court correctly increased defendant's total offense level by eight levels, pursuant to United States Sentencing Guideline Section 2J1.2(b)(1)(A), based upon a finding that defendant threatened to cause physical injury to a government witness in order to obstruct the administration of justice.

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OPINIONS BELOW

Kelvin Ellis, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 2, 2007. The July 2, 2007, opinion of the United States Court of Appeals for the Seventh Circuit, the judgment of which is sought in this petition to be reviewed, is an unpublished Opinion and is reprinted in the Appendix to this petition at App. pp. 1-9. The prior ruling of the United States District Court, Southern District of Illinois denying the petitioner's Objection to the Pre-Sentence Report, entered is an unpublished bench decision, and is reprinted in the Appendix to this petition at App. pp. 22-28. The judgment in the case was entered on August 3, 2006 and is reprinted in the Appendix to this petition at App. pp. 10-21.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

U.S.S.G. § 2J1.2(b)(1)(A)

Reprinted in the appendix to this petition at App. p. 29.

STATEMENT OF THE CASE

On January 21, 2005 Defendant was charged by Indictment in the Southern District of Illinois with a violation of Title 18, United States Code, Sections 1512(c)(2) and 2 (Count one, attempting to aid and abet obstruction of justice), and with violations of Title 18, United States Code, Sections 1503 and 2 (Counts two and three, endeavoring to aid and abet obstruction of justice).

As part of the factual basis, it was developed that on October 6, 2004, Defendant told his friend, Rudy McIntosh, that the confidential informant had been to the U.S. Attorney's Office and had told federal law enforcement officers that Defendant had been involved in election fraud and other potential crimes. Unbeknownst to Defendant, McIntosh also had spoken to federal law enforcement officers regarding the election fraud and taped this conversation and others thereafter as part of the investigation.[1] During these conversations, Defendant spoke about wanting to "destroy [the confidential informant's] credibility." During these conversations, Defendant suggested planting drugs on the Defendant to destroy her credibility and "get her ass off the street" by putting her in jail. During these conversations, Defendant also suggested obtaining a tape recording of the

[1] Dannita Youngblood also takes part in some of these taped conversations. Youngblood was also working with the Government at the time the tapes were recorded.

confidential informant threatening the life of another woman in order to destroy the confidential informant's credibility.

Defendant never suggested having the confidential informant killed or wanting her killed at any time that Defendant and McIntosh spoke.

During these conversations, it is actually McIntosh who raises the idea of "doing something different" than destroying her credibility and suggests killing the confidential informant. McIntosh even asks Defendant directly, "How far do you want it to go?" and Defendant answers "all the way." Defendant then explains that "all the way" means a possible prostitution charge and confirms that, "I want her credibility destroyed." McIntosh then states, "now, with the – with the – with the credibility thing, it needs to go up" explains "it can be done," and asks "what do you want me to do?" Defendant again confirms that he wants McIntosh to take it as "far as you can take it. I want this bitch locked up."

During a conversation on November 19, 2004, Defendant makes some statements that could be taken as a threat if taken out of context. However, Defendant's intention of only discrediting the confidential informant is clarified with certainty after McIntosh suggests:

> we can dispose of her. I mean, dispose of her. I ain't talking with the crack. I mean, if that's what you want done – when Defendant

states that *"all we need to do is discredit her,* dispose of her." (emphasis added.)

Thereafter, on November 24, 2004, McIntosh informed Defendant that he had killed the confidential informant. He also showed Defendant a staged photograph of the confidential informant set up by federal enforcement to look like the confidential informant had been murdered.

The defendant entered a guilty plea on October 12, 2005. On March 26, 2007 Ellis filed Objections to the Pre-Sentence Report objecting to an eight point enhancement pursuant to U.S.S.G. § 2J1.2(b)(1)(A) which applies if the offense involved causing or threatening to cause physical injury to a person in order to obstruct the administration of justice. Hearings were held on April 7, July 20 and July 27, 2006. On, July 27, 2006, the Honorable Michael J. Reagan denied the objection and ruled that the enhancement was appropriate. Thereupon the defendant was sentenced to 121 months imprisonment as to count one, and 120 months imprisonment as to each of counts two and three, all counts to run concurrently for a total sentence of 121 months imprisonment, 3 years supervised release, a fine of $12,500, and a special assessment of $300. The district court entered its Judgment and Commitment Order on August 3, 2006. Defendant filed a timely Notice of Appeal on August 3, 2006. The Seventh Circuit Court of Appeals affirmed the United States District Court on July 2, 2007.

REASONS FOR GRANTING THE WRIT

The judgment of the Seventh Circuit Court of Appeals should be reviewed by this Court because it has decided an important federal question in a manner which misapplies U.S.S.G. § 2J1.2(b)(1)(A) as well as being a case of first impression for all Federal Districts.

Defendant does not dispute that he is guilty of obstruction of justice or that he made statements (that the Government captured on tape) which show that he intended to obstruct a grand jury investigation by attempting to mar the credibility of a witness. What is in dispute is whether he threatened to have this confidential informant injured or killed. When the conversations are viewed as a whole and read within the context of all the conversations that took place in the Fall of 2004, it is clear that Defendant never threatened to physically harm the confidential informant. He clearly stated on many occasions that the plan was only to "destroy the credibility" of the confidential informant by having her criminally charged with possession of narcotics, prostitution, or for a threat the confidential informant made on tape to kill another woman. Any suggestion of killing the confidential informant came only from the Government's agents. As such, an 8 level enhancement under U.S.S.G. § 2J1.2(b)(1) was unwarranted and was in error. Moreover, the enhancement based upon this alleged uncharged conduct so outweighs the original sentence for the charged conduct as to make it clearly erroneous.

A review of the transcripts without regard to credibility reveals that Defendant *never* threatened to harm the confidential informant at any time. Any suggestion of harming her came from the Government's agents. Moreover, these suggestions were summarily dismissed by Defendant when he consistently reiterated his intention only to discredit her or to "destroy her credibility."

Specifically, Defendant suggested planting drugs on the Defendant to destroy her credibility and "get her ass off the street" by putting her in jail. Defendant also suggested obtaining a tape recording of the confidential informant threatening the life of another woman in order to destroy the confidential informant's credibility. However, he did not threaten to physically harm the confidential informant.

Simply put, there is no point in time during any of the taped conversations that Defendant ever suggested having the confidential informant killed or wanting her killed. Despite the Government's many attempts to bait Defendant into acquiescing to such a plot, evidence that he threatened such action, intended such action, or agreed with such action simply did not exist.

During these conversations, it is actually McIntosh who raises the idea of "doing something different" than destroying her credibility and suggests killing the confidential informant. McIntosh even asks Defendant directly "How far do you want it to go?" and Defendant answers "all the way." Defendant then

explains that "all the way" means a possible prostitution charge and confirms that "I want her credibility destroyed." McIntosh then states "now, with the – with the – with the credibility thing, it needs to go up", explains "it can be done," and asks "what do you want me to do?" Defendant *again confirms* that he wants McIntosh to take it as "far as you can take it. *I want this bitch locked up*" when the conversations are viewed as a whole and read within the context of all the conversations that took place in the Fall of 2004, it is clear that Defendant *never* threatened to physically harm the confidential informant. He clearly stated on many occasions that the plan was only to "destroy the credibility" of the confidential informant by having her criminally charged with possession of narcotics, prostitution, or for a threat the confidential informant made on tape to kill another woman. Any suggestion of killing the confidential informant came only from the Government's agents. As such, U.S.S.G. § 2J1.2(b)(1) simply does not apply. Accordingly, an 8 level enhancement under U.S.S.G. § 2J1.2(b)(1) was unwarranted and was in error.

The Seventh Circuit's reliance on *United States v. Sidhu*, 130 F.3d 644, 652 (5th Cir. 1997) and *United States v. Schnurstein*, 977 F.2d 449, 455 (8th Cir. 1992) is misplaced. In *Sidhu*, defendant Gifford gave numerous medical patients unnecessary injections of morphine and the case did not involve alleged verbal threats against a witness. In *Schnurstein*, the defendant verbally threatened the government witness and the defendant took part in beating the witness. Neither

the Seventh Circuit nor any party to this case could cite any reported cases on point to the facts in this case-that a government agent concocted and escalated a series of discussions which culminated in a fake homicide, because no such cases could be found. In *United States v. Hale*, 448 F.3d 971, 983 (7th Cir. 2005), defendant Hale solicited an individual which resulted in the murder of a federal court judge. Again, the facts in Hale are inapposite to this case.

By the very terms of U.S.S.G. § 2J1.2(b)(1)(A) and the application notes, as well as viewing the actions of the petitioner, the District and Circuit Court of Appeals erred, and the petitioner's claim should have prevailed.

CONCLUSION

For the above reasons, Petitioner Kelvin Ellis respectfully requests that his petition for a writ of certiorari be granted.

Dated: October 1, 2007.

Respectfully submitted,

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